IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 1015 OF 2005

ARDESHIR E. MODY & Ors. ... PETITIONERS

Versus

M/s. Warden & CO. (India) Pvt. Ltd. .. RESPONDENTS

Mr. Vineet B. Naik for petitioners

Mr. M.S. Dehlvi i/b M/s. Negandhi Shah & Himayatullah for respondents

CORAM:-SMT. RANJANA DESAI, J.

DATED:-11-4-2005

P.C.

This petition is filed by the original plaintiff. The challenge in this petition is to the order dated 17/11/04 passed by the Division Bench of the Small Causes Court in Revision Application No. 39 of 2004 filed by the plaintiffs against the order dated 6/8/12/03.

2. Miscellaneous Notice No. 207 of 2002 was taken out by the defendant for setting aside ex parte judgment and decree dated 26/4/01. Defendants inter alia contended that their advocate Shri R. S. Deshmukh, went on telling

them that he would inform them the progress of the matter. However, Advocate Deshmukh failed to do so. He was utterly negligent. Therefore, the ex parte decree came to be passed.

3. The trial court observed that the defendant was throwing the entire blame on his advocate. The trial court did not accept the case of the defendant that because of the advice and instructions of previous advocate they did not remain present in the court. The trial court came to a conclusion that the defendant was negligent. The trial court, however, observed that though the defendant is found to be negligent, the decree which is sought to be set aside is a decree of eviction and hence it is necessary to set it aside by compensating the plaintiff by awarding costs.

4. The revisional court, however, on examining the case independently came to the conclusion that the trial court was wrong in observing that the explanation given by the defendant was not acceptable. The revisional court accepted the defendants' explanation and dismissed the revision application.

5. I have heard Mr. Naik, learned counsel appearing for the petitioner. He contended that the issues were framed on 2/8/97, the suit was posted for hearing on 2/12/2000 and the decree was passed on 26/4/01. An application for issuance of notice before execution was made on 24/10/01. Thereafter notices were issued and thereafter after five months application

for setting aside ex parte decree was filed. He submitted that the explanation given by the defendant was rightly found to be not acceptable by the trial court. Advocate Deshmukh has not filed his affidavit. In the circumstances both the courts have fallen into an error in setting aside the ex parte decree.

6. I am unable to agree with the learned counsel. The defendant is a company. It has filed a written statement. Thus it is clear that the defendant wanted to contest the suit. It appears that Mr. Shivdasani, Director of the defendant who was looking after the affairs of the company died on 16/4/97. Thereafter Advocate Deshmukh promised the defendant that he would keep the defendant posted about the progress of the matter. Advocate Deshmukh failed to do so. It is only when Advocate Deshmukh returned the papers and new advocate was engaged by the defendant that they came to know that the suit was decreed. The trial court failed to appreciate this explanation. The revisional court has rightly held that explanation offered by the defendant is acceptable. Besides the defendant has suffered a decree of eviction. Both the courts have thought it fit to set aside the ex parte decree. In such matters interference in writ jurisdiction is not called for. The writ petition is, therefore, dismissed.

7. Certfied copy is expedited.